

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPHINE MERCER and DEPARTMENT OF THE AIR FORCE,  
NEWARK AIR FORCE STATION, Newark, OH

*Docket No. 03-2179; Submitted on the Record;  
Issued November 14, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for reconsideration of the merits of her claim on the grounds that it was untimely filed and failed to show clear evidence of error.

This case has previously been before the Board on appeal.<sup>1</sup> In its November 6, 1984 decision, the Board found that appellant was not entitled to more than a 17 percent permanent loss of use of the left arm for which she received a schedule award.<sup>2</sup> The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Appellant subsequently received appropriate compensation and, on about May 22, 1987, received a schedule award for an additional three percent impairment covering the period from November 5, 1986 to January 9, 1987.<sup>3</sup>

The claim was subsequently closed. Sometime, late in 1992, and again by letter dated October 18, 1994, appellant requested that her claim be reopened.<sup>4</sup> By decision dated March 13, 1995, the Office denied the claim for continuing medical benefits and compensation for the reason that the medial evidence did not establish that the current condition and need for treatment were the result of an injury sustained 27 years prior.

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<sup>1</sup> Appellant, then a 48-year-old clerk typist, injured her left arm on February 12, 1968 when she opened a door at work. The Office accepted her claim for left lateral humeral epicondylitis, tear of extensor aponeurosis and lateral condyle of the humerus with functional overlay.

<sup>2</sup> Docket No. 84-1353 (issued November 6, 1984).

<sup>3</sup> Appellant requested reconsideration on April 6, 1988 and, by decision dated October 12, 1988, the Office denied modification.

<sup>4</sup> The exact date of the 1992 request is unclear. The case was reconstructed.

By letter dated June 7, 1995, appellant requested reconsideration indicating that the original injury led to the complications that affected her left shoulder. By decision dated June 26, 1995, the Office denied modification of its previous decision.

Appellant subsequently requested that her claim be reopened. As the Office was unable to retrieve the original file from the Federal Records Center, the case record was reconstructed.<sup>5</sup> On June 9, 2003 appellant through her congressional representative, requested reconsideration.

In a letter dated June 7, 2003, appellant indicated that she was providing new evidence not previously considered since the denial of her claim on March 13, 1995 and that she would like to have an increase in her schedule award. The additional evidence was comprised of occupational therapy reports, electromyography (EMG) reports, progress notes and medical reports.

By decision dated July 29, 2003, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>6</sup> As appellant filed her appeal on August 31, 2003, the only decision properly before the Board is the July 29, 2003 decision denying appellant's request for reconsideration.

The Board finds that the Office properly refused to reopen appellant's claim for reconsideration of the merits of her claim on the grounds that it was untimely filed and failed to present clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time or on his own motion or on application.

"The Secretary, in accordance with the facts found on review, may --

- (1) end decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128. One such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. In the instant case, appellant requested review of the Office's March 13 and June 26, 1995 decisions, in her letter dated June 9, 2003, well over one

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<sup>5</sup> Appellant made several additional requests for reconsideration and to have her claim reopened on September 17, 2001, March 13, 2002 and January 27, 2003.

<sup>6</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991).

year after the decisions. Since the reconsideration request was dated June 9, 2003, the request is beyond the one-year time limit and is considered untimely filed.<sup>7</sup>

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error.<sup>8</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>9</sup> This determination of clear error entails a limited review by the Office of the evidence submitted with the reconsideration request and whether the new evidence demonstrated clear error on the part of the Office.<sup>10</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.<sup>11</sup>

In accordance with its internal guidelines and with Board precedent, the Office properly proceeded to perform a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act, notwithstanding the untimeliness of her application. The Office reviewed the evidence submitted by appellant in support of her application for review and found that it did not clearly establish that the Office's prior decision was in error.

The relevant evidence submitted with appellant's request included an EMG report dated February 19, 2001, in which Dr. Timothy R. Gatens, Board-certified in physical medicine and rehabilitation, diagnosed left carpal tunnel syndrome to a mild degree and found normal right median nerve studies. Appellant's claim was accepted for left lateral humeral epicondylitis, tear of extensor aponeurosis, lateral condyle of the humerus with functional overlay. Dr. Gatens did not provide any opinion with respect to how the left carpal tunnel was related or subsequently developed as a result of appellant's accepted employment injury.<sup>12</sup> The Board has long held that medical opinions not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet appellant's burden of proof.<sup>13</sup>

Appellant submitted several reports from Dr. John D. Quimjian, a Board-certified orthopedic surgeon, dating from May 2 to July 18, 2001. In his May 2, 2001 report, Dr. Quimjian, indicated that appellant came in with complaints of pain, numbness and tingling in her "left, greater than right hand." Further he noted a "crush injury," to her left arm. The record

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<sup>7</sup> The Board further notes that, if the earlier requests of September 17, 2001 or March 13, 2002 were used, her request would also be untimely.

<sup>8</sup> 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECBA 663, 665 (1997).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

<sup>12</sup> *Charles E. Burke*, 47 ECAB 185 (1995).

<sup>13</sup> *Caroline Thomas*, 51 ECAB 451 (2000).

does not reflect that appellant sustained a “crush injury.”<sup>14</sup> Dr. Quimjian diagnosed left carpal tunnel syndrome and right wrist tendinitis, global weakness of the left upper extremity, not explained on her EMG report and status post crush injury of the left upper extremity. He also diagnosed thumb CMC arthritis by clinical examination and indicated that appellant had splints. Dr. Quimjian described the treatment that appellant received, which included injections to both carpal canals. In his May 23, 2001 report, Dr. Quimjian indicated that appellant was in for a recheck and that he had consulted with Dr. Gatens, who felt that appellant’s problems were due to her old injury. He noted that appellant’s physical examination was somewhat inconsistent as x-rays showed degenerative changes in the left thumb. Dr. Quimjian diagnosed left thumb CMC arthritis, improved carpal tunnel syndrome, intrinsic weakness and inconsistent physical examination with varying efforts in terms of obtaining grasp and recommended that physical therapy be continued. In his July 18, 2001 report, Dr. Quimjian indicated that the previous medical records which appellant brought in were reviewed. He noted that appellant was seen by multiple doctors in the past, with documentation of weakness and intrinsic atrophy. Dr. Quimjian added that no one had ever been able to determine with certainty, the cause. The Board has held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value.<sup>15</sup> He also noted that all previous EMG’s reports were normal and that Dr. Gatens felt it might be secondary to disuse atrophy post injury and one of the neurologists raised the possibility of a low grade CVA which might have caused some problems with the upper left extremity. Dr. Quimjian opined: “I can only think of one or two plausible reasons for her current situation with the left upper extremity: (a) Her original diagnosis was severe lateral epicondylitis and she may have developed sympathetic dystrophy resulting in the atrophy; (b) She at some point had a low grade CVA.” Dr. Quimjian indicated that there was no need for a head magnetic resonance imaging scan unless symptoms worsened, since it would not change appellant’s treatment and discussed ongoing conservative care which included heat, celebrex, CMC brace and carpal tunnel injections. However, he offered no explanation to show how her original diagnosis developed or how a low grade CVA would be related to her accepted injury. Further, Dr. Quimjian’s reports were insufficient as they did not contain a rationalized opinion causally relating appellant’s current symptoms to her accepted injury and they were speculative. Additionally, neither physician provided an impairment rating or explained how appellant could have a normal left shoulder in 1994 and subsequently incur all of the subsequent problems and relate them to the original accepted injury.<sup>16</sup>

Appellant also provided several occupational therapy reports dating from May 9 to June 7, 2001. However, they are of no probative value inasmuch as an occupational therapist is not considered a physician under the Act and, therefore, is not competent to give a medical opinion.<sup>17</sup>

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<sup>14</sup> The Board has held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value) *Vaheh Mokhtarians*, 51 ECAB 190 (1999).

<sup>15</sup> *Vaheh Mokhtarians*, *supra* note 14.

<sup>16</sup> See radiograph of July 14, 1994.

<sup>17</sup> 5 U.S.C. § 8101(2); see also *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

Appellant also provided her own statements where she indicated that her doctor told her that she had damage to her left hand which was attributed to the injury of February 12, 1968 and that she believed the pain and suffering she endured from 1968 to 2003 was due to negligence. However, in order to establish the problems she continued to experience were causally related, she would have to provide medical evidence establishing such and as noted, the medical evidence received was insufficient. Further, her statements were repetitive of her previous requests.

In this case, even if the record contained a rationalized medical opinion, this would not be enough to show clear evidence of error. The term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence, which, if submitted before the denial was issued, would have required opening the case for further development, is not clear evidence of error and would not require a review of the case.<sup>18</sup> These reports do not otherwise show that the Office erred in its prior decisions.

Because appellant’s untimely request for reconsideration failed to demonstrate clear evidence of error in the Office’s decision denying appellant’s claim for continuing benefits and compensation, the Office properly denied a merit review of her claim.

The decision of the Office of Workers’ Compensation Programs dated July 29, 2003 is hereby affirmed.

Dated, Washington, DC  
November 14, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).